IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1103 of 1995

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ASE INFORMATION SERVICE

Versus

YOGESH P JANI

Appearance:

MR KS NANAVATI for Petitioner

MR NR SHAHANI for Respondent No. 1

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 18/10/1999

ORAL JUDGEMENT

Heard the learned advocates for the respective parties.

2. The petitioner before this Court is the ASE Information Service, a Division of Ambalal Sarabhai Enterprise [hereinafter referred to as, `the Management']. The respondent is a workman who, at the relevant time, was the office bearer of the Union of the workmen and was declared to be a `protected workman' [hereinafter referred to as, `the workman'].

3. The management challenges the judgment and order dated 12th May, 1994 passed by the Industrial Tribunal, Vadodara in Complaint (IT) No. 47 of 1993 in Reference (IT) No. 170 of 1989.

4. It appears that the above referred IT No. 170 of 1989, in respect of various demands of the workmen, is pending before the Industrial Tribunal, Vadodara. Pending the said reference, on 7th July, 1990, an altercation took place between the senior officers of the management and the office bearers of the Union. It is alleged that the workman instigated other workmen to stop work and led a group of workmen to the administrative office and abused senior officers of the management and entered into the administrative block, initiated heated verbal exchange with the president of the Computer Centre. On account of this misbehaviour of the workman, under the Order dated 9th July, 1990, he was placed under suspension. The order of suspension stipulated that, `you are hereby suspended from your work with immediate effect till the domestic enquiry is completed and the decision of the management is communicated to you in the matter.' Since then, a chargesheet was issued upon the workman and a departmental inquiry was held. After holding inquiry, the management under its communication dated 5th February, 1993, intimated the workman that the management had decided to dismiss him from service and that the same shall become effective from the date, the Tribunal grants the permission under Section 33 (3) of the Industrial Disputes Act, 1947 [hereinafter referred to as, `the Act']. Pursuant to the said decision, the management preferred an application No. 2 of 1993 in the pending Reference (IT) No. 170 of 1989 under Section 33 (3) of the Act, seeking permission to dismiss the workman. The said application, I am told, is still pending. The workman preferred the above referred application no. 47 of 1993 under Section 33-A of the Act alleging therein that continuous suspension of the workman, pending application for permission, would amount to alteration of condition of service, and consequently, violates provision of Section 33 of the Act. The Tribunal tried the above referred application No. 47 of

1993 and held that continuous suspension of the workman, pending application for permission under Section 33 (3) of the Act, was illegal and violative of Section 33 of the Act. The Tribunal, therefore, directed that the workman be reinstated in service with effect from 6th February, 1993 and he be paid difference of wages from the date of 6th February, 1993. Therefore, the petition.

5. The only question that arise for my consideration is - whether the management, by continuing the workman under suspension pending application for permission, has altered the condition of service of the workman or in other words, do the conditions of service of the workman provide that the workman shall not be suspended from service, pending application for permission under Section 33 (3) of the Act.

6. It is a settled proposition of law that conditions of service can either be provided by a statute or by terms of employment. In the present case, it is undisputed that the conditions of service of the workman are governed the model standing orders that are applicable to management. It is also not disputed that under the relevant standing order, the management has a right to suspend the workman pending disciplinary action.

7. Mr. Chudgar has submitted that the management has proposed to dismiss the workman for the misconduct proved against him. The order of dismissal would become effective from the date the permission is granted by the learned Tribunal. The management has, therefore, a right to continue the workman under suspension, even pending application for permission. The continuous suspension of the workman does not violate or alter any of the service conditions of the workman. The application under Section 33-A of the Act made by the workman was, therefore, not maintainable. Mr. Chudgar therefor relied upon the judgments of the Supreme Court in the matters of Management of Ranipur Colliery under M/s. Equitable Co. Limited v. Bhuban Singh & Ors. [AIR 1959 SC 833] and of Fakirbhai Rulabhai Solanki v. Presiding Officer & Anr. [AIR 1986 SC 1168]. In the matter of Management of Ranipur Colliery [Supra], the Hon'ble Supreme Court was considering the scope and ambit of Section 33 of the Act. The Court held that, `....thus, if Section 33 had not been there, the contract of service with the employee would have come to an end by the dismissal immediately after the conclusion of the inquiry and the employee would not have been entitled to any further wages. But section 33 steps in and stops the employer from dismissing the employee immediately on the conclusion of

his inquiry and compels him to seek permission of the Tribunal, in case some industrial dispute is pending between the employer and his employees. It stands to reason therefore that so far as the employer is concerned he has done all that he could do in order to bring the contract of service to an end. To expect him to continue paying the employee after he had come to the conclusion that the employee was guilty of misconduct and should be dismissed, is, in our opinion, unfair, simply because of the accidental circumstance that an industrial dispute being pending he has to apply to the tribunal for permission. It seems to us therefore that in such a case the employer would be jusitifed in suspending the employee without pay after he has made up his mind on a proper enquiry to dismiss him and to apply to the tribunal for that purpose.'

8. In the matter of Fakir F. Solanki [Supra], the Hon'ble Supreme Court has held that if pending application for permission under Section 33 (3) of the Act, management suspends the workman from service, it shall also pay the subsistence allowance. Non-payment of such allowance should result into denial of opportunity to workman to defend himself and the order of dismissal would be violative of principles of natural justice.

9. Mr. Sahani has contested the petition and has submitted that the question here is whether by keeping the workman under suspension, pending application under Section 33 (3) of the Act, the condition of service of the workman has been altered or not. He has relied upon the order of suspension dated 9th July, 1990 and more particularly, the stipulation made therein and reproduced hereinabove. He has submitted that the management was alive to the fact that the workman being a `protected workman', the management would be required to seek permission before implementing the order of dismissal from service. Nonetheless, the management had bound itself by incorporating above referred stipulation in the order of suspension. The suspension of the workman was made operative, pending completion of disciplinary action alone and till the date the management takes a decision and communicates the same to the workman. Mr. Sahani has vehemently argued that the management having fettered its power cannot continue the petitioner under suspension after the decision of the management is communicated to the petitioner and pending application for permission under Section 33 (3) of the Act. Such continued suspension amounts to alteration of condition of service which is expressly prohibited under Section 33 of the Act. The complaint made by the workman under Section

33-A of the Act was, therefore, wholly justified and the learned Tribunal has rightly issued the impugned direction.

10. On the facts of the case, neither of the judgments relied upon by Mr. Chudgar lends support to the management. This is not the case where the question whether the workman can or cannot be placed under suspension, pending application for permission under Section 33 (3) of the Act arises for the consideration by the Court. As discussed hereinabove, the only question is whether the stipulation made in the order of suspension dated 9th July,1990 can be said to be a condition of service and whether continuous suspension of the workman can be said to be alteration of the said condition of service.

11. I am unable to agree with the contentions raised by Mr. Sahani. The conditions of service are those which are prescribed either under the Statute or under the relevant contract of service. In the present case, it is undisputed that the service conditions of the workman are governed by the provisions made in the Industrial Employment Standing Orders. The said Order does not make provision as regards the status of a workman pending application under Section 33 of the Act. Mr. Sahani, however, has relied upon the Order No. 23 (5)[b](ii) and has contended that pending suspension beyond first 180 days from the date of suspension, the workman is entitled to subsistence allowance not less than 3/4th of the basic wages, dearness allowance and other compensatory allowance to which he would have been entitled to, if he were on leave. In the present case, however, the management has not paid the subsistence allowance in accordance with the above Standing Order but has paid subsistence allowance less than what the workman is entitled to. Thus, the management has altered the service condition of the workman. If at all the workman has been paid subsistence allowance less than what he is entitled to, the workman may be entitled to recover the difference thereof. However, that cannot be termed as alteration of service condition. No statute or Standing Order or any other term of employment stipulates that the workman shall not be kept under suspension pending application for permission under Section 33 (3) of the Act. The fetter imposed by the Management in the order of suspension cannot be termed as a condition of service nor the same can be said to be a contract of service.

12. In view of the above discussion, I am of the

opinion that the learned Tribunal has erred in holding that the Management had violated the provision contained in Section 33 of the Act. The petition is, therefore, allowed. The impugned judgment and order dated 12th May, 1994 made by the Industrial Tribunal, Vadodara on Complaint (IT) No. 47 of 1993 is quashed and setaside. The application No. 47 of 1993 made under Section 33-A of the Act is dismissed. Rule is made absolute. The parties shall bear their own costs.

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Prakash*